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## APPENDIX

### Second Court of Appeals Decision

(January 5, 1970) 419 F. 2d 1280

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

PER CURIAM: Pursuant to Rule 18 of the Rules of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the clerk to place the case on the Summary Calendar and to notify the parties in writing. See *Murphy* v. *Houma Well Service*, 5 Cir. 1969, 409 F. 2d 804, Part I; and *Huth* v. *Southern Pacific Company*, 5 Cir. 1969, — F. 2d —, Part I (No. 27,439, October 7, 1969).

The quantum of damages for the improper construction of a warehouse is the sole issue on this second appeal of the same case. We affirm the judgment of the District Court. Our prior decision is reported at 406 F. 2d 815 (5 Cir. 1968, rehearing en banc denied February 10, 1969). Kuniansky had constructed a warehouse for Overmyer, but the work was not accomplished according to the plans and specifications.

At the original trial Overmyer contended that the measure of damages should be the cost of restoration and repair, the Georgia rule where bad faith is shown [406 F. 2d 818, 819]. The District Court found no bad faith. It therefore held the applicable rule to be that where a builder acts in good faith the proper measure of damages for improper construction is the difference in value as delivered and that the building would have had if completed in accordance with the contract. With this we agreed on the first appeal, but we held that the District Court had not correctly applied the standard.

Specifically, we stated:

> "[A]ll the evidence indicates that the entire building was damaged, and the damage to the entire build-

ing was the appropriate consideration for the court. Moreover, there was testimony for the judge's deliberation as to the diminution in value of the entire building. We are therefore constrained to reverse on this issue and remand for an inquiry into the reduction in value of the entire building.

"The judgment of the trial court is affirmed *as to all points* (emphasis ours) except the method of computing damages which we reverse and remand with the directions above."

Pursuant to this decision the parties filed briefs and reargument on the evidence. The District Judge then awarded the owner judgment in the sum of $45,000, with interest from the date of the original judgment. Being dissatisfied with this recovery the owner, as stated, again appeals.

The testimony of a witness on behalf of the builder was that the improper construction of the building diminished its fair market value by only $8,000. The testimony of a witness for the warehouse owner was that the improper construction had diminished the fair market value by $95,000.

Overmyer argues that there is no authority or basis in the record for an award of $45,000 so the trial judge had to resort to matters of personal knowledge, acquired outside the record. The essence of such an argument, although the appellant does not so state it, is that the District Judge had no choice but to accept either the $8,000 figure of the builder or the $95,000 figure of the building owner.

The values involved in this litigation inevitably had to be largely matters of opinion. The values had not been tested in sales from willing sellers to willing buyers, dealing at arm's length. The opinion of the witness for the builder fixed the diminution in value at the obvi-

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ously low figure of $8,000. The opposing opinion of the appraiser for the warehouse owner went to the high side, $95,000. The finding of the District Court was between the two; that is, it was within the range of the testimony.

In one of our recent cases *M/V ENAK.* v. *Monplaisir,* 391 F. 2d 277 (5 Cir. 1968) the issue concerned damages occasioned by the sinking of a vessel. Both sides appealed, one claiming that the damages were excessive, the other that they were inadequate. We applied Rule 52(a) Federal Rules of Civil Procedure and affirmed per curiam.

This is a civil case. The parties chose the proof upon which they proposed to have the case decided. This reminds us of what the Fourth Circuit said in *Whitaker* v. *Blidberg Rothchild Company,* 1961, 296 F. 2d 554, "Insistence on mathematical precision would be illusory and the judge or juror must be allowed a fair latitude to make reasonable approximations guided by judgment and practical experience", 296 F. 2d at 555.

We find ourselves to be without a definite and firm conviction that a mistake had been made in fixing the valuation in dispute, *Chaney* v. *City of Galveston,* 5 Cir. 1966, 368 F. 2d 774.

The judgment of the District Court is

AFFIRMED.

**Second District Court Decision**

## OPINION ON REMAND

This case is on remand for reassessment of damages awarded to the original plaintiff, D. H. Overmyer Warehouse Co., Inc. *Kuniansky* v. *Overmyer Warehouse Co.*, 406 F. 2d 818 (5th Cir. Dec. 20, 1968). Following entry of the mandate on February 24, 1969, the parties filed briefs and reargument on the evidence and the matter is now ripe for a new finding.

In the opinion, the Circuit Court rejected the court's finding that "the maximum area affected was 12,500 square feet or that the value of such as delivered was $.50 per square foot." P. 822(15). Instead the court was directed to enter a finding based on the difference in market value of the entire building. "Moreover, there was testimony for the judge's deliberation as to the diminution in value of the entire building." Apparently, this reference is to the testimony of plaintiff's witness, Key (R 521-523) and the defendant's witness, Kuniansky (R 725). The court does not consider the former inoperative because of the inclusion of a constant land value of $61,000 in his "before and after" testimony. The same was done by Kuniansky. While Key also testified that the building would have been worth $3.60 per square foot if properly constructed (120,000 × 3.60 = $432,000), there was no specific square foot value placed on the improper constructions.

In any event, the range of testimony is as follows:

| Key | | Total Damage |
|---|---|---|
| If proper | 500,000 | |
| As was | 405,000 | |
| | | $95,000.00 |
| **Kuniansky** | | |
| If proper | 500,000 | |
| As was | 492,000 | |
| | | 8,000.00 |

Thus, the limits of the court's findings in this respect are $8,000 to $95,000.

In such a situation under Georgia law, the trier of fact has freedom to select any figure within the range, and is not bound by either specific. Georgia Code § 38-1709. *E.g.*, *Southern Cotton Oil Co.* v. *Thomas*, 155 Ga. 99(8) (1922); *Johns* v. *League, Duvall & Powell, Inc.*, 202 Ga. 868(1) (1947); *Lee* v. *Creaty*, 104 Ga. App. 429 (1961). Moreover, the triers of fact are not absolutely bound by the opinion as to value of any witness, even though it be uncontradicted, but may draw from their own experience in fixing damages for market value. *E.g.*, *National Ben Franklin Fire Insurance Co.* v. *Purvis*, 61 Ga. App. 624 (1940); *Watson* v. *Tompkins Chevrolet Co.*, 83 Ga. App. 440(3) (1951); *Imperial Investment Co., Ltd.*, v. *Modernization Construction Company*, 96 Ga. App. 385(3) (1957); *Hoard* v. *Wiley*, 113 Ga. App. 328(3) (1966). It was, in fact, the application of these rules which led the court to some of the findings disapproved on appeal and the court felt that sufficient data and identity of damage was present to exercise knowledge and experience in such matters under the Georgia law.

Be that as it may, the court is directed to make a finding as to diminution in value of the entire building. And in doing so may not ascribe any value to any part which failed. Accordingly, the court finds:

> The building, if constructed in accordance with plans and specifications would have been worth the sum of $432,000 in 1959. The building, as actually constructed, was worth only $387,000. The difference in the two figures, or $45,000, is the proper measure of damages to plaintiff.
>
> The claims for repair expense, attorneys fees, etc. are again rejected for the reasons originally asserted.

Let new judgment issue in favor of the plaintiff and against the defendant in the sum of $45,000.00 plus interest at 7% from December 15, 1967, the date of the original judgment.

IT IS SO ORDERED.

This the 4th day of June, 1969.

SIDNEY O. SMITH, JR.
Sidney O. Smith, Jr.
*United States District Judge*